



United States Department of the Interior



BUREAU OF LAND MANAGEMENT
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In Reply Refer To:

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March 6, 2018

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
7012 1640 0000 3799 6355

Mr. Bruce Pendery
The Wilderness Society
440 East 800 North
Logan, UT 84321

PROTEST DECISION

DISMISSED

I. INTRODUCTION

On December 14, 2017, a Lease Sale Notice for the Montana State Office (MSO), March 13, 2018, Competitive Oil and Gas Lease Sale was posted, which initiated a 30-day protest period. At the same time, the Butte Field Office (BFO), Billings Field Office (BiFO), and North Central Montana District (NCMD) Oil and Gas Leasing Environmental Assessments (EAs), updated after a 30-day public comment period, were made available to the public.

In a fax to the Bureau of Land Management (BLM) dated January 11, 2018 (Enclosure 1), the Wilderness Society, Park County Environmental Council, and the Montana Wilderness Alliance (Protesters) submitted a timely protest to the inclusion of 109 parcels located in the BFO, BiFO, and NCMD planning areas, Montana.

II. BACKGROUND

Public scoping for this lease sale was conducted from August 15-29, 2017. This scoping period was announced in a press release issued by the MSO. The BFO, BiFO, and NCMD also posted National Environmental Policy Act (NEPA) notification log, reference numbers DOI-BLM-MT-L002-2017-0003-EA, DOI-BLM-MT-L002-2017-0002-EA, and DOI-BLM-MT-L0002-2017-0004-EA, respectively. In addition, the MSO mailed surface owner notification letters explaining the oil and gas leasing and planning processes. The letters requested written comments regarding

any issues or concerns that should be addressed in the EAs being prepared for the parcel. The Protesters did not submit scoping comments.

On September 30, 2017, the BLM Montana/Dakotas released the BFO, BiFO, and NCMD Oil and Gas Leasing EAs for a 30-day public comment period. The EAs analyzed the potential effects from offering 109 nominated lease parcels in Montana containing 63,495 acres of Federal Mineral Estate in the March 13, 2018, Competitive Oil and Gas Lease Sale. Relevant public comments received during this process were addressed in the EA, as appropriate. The Protesters submitted comments on the EAs regarding NEPA, FLPMA, MLA, and water resources. The EAs were updated and posted, along with the competitive sale list, on December 14, 2017, on the BLM's ePlanning website for a 30-day protest period.

After a careful review, BLM has decided to defer 23 BiFO parcels and three (3) BFO parcels due to potential environmental impacts presented in the EAs and public comments. See Enclosure 3 for a description of the deferred parcels. Any arguments within this protest on deferred parcels are considered moot. The Butte and Billings Field Managers, and the NCMD District Manager recommended that 83 parcels be included in the March 13, 2018, lease sale. As a result of the Decision Record, a total of 83 nominated lease parcels (46,175 acres of Federal minerals) would be offered for lease at the MSO, March 13, 2018, Competitive Oil and Gas Sale with lease stipulations and/or lease notices as necessary for the proper protection and conservation of the resources associated with the lease issuances.

III. PROTEST ANALYSIS

Protest Summary: The Protesters submitted a timely protest (via fax) dated January 11, 2018, to the inclusion of 109 parcels identified in the MSO, March 13, 2018, Notice of Competitive Oil and Gas Lease Sale.

Protest Contentions and BLM Response:

A. BLM's Attempts to Rebut and to Ignore the Concerns in Our Three October 30, 2017 Comment Letters Have No Legal Basis.

1. BLM has still not considered a reasonable range of alternatives.

As to the issue of considering an adequate range of alternatives, a summary treatment of alternatives, as has occurred here, "must be measured against the standards in 42 U.S.C. § 4332(2)(E) and 40 C.F.R. 1508.9(b). *Davis v. Mineta*, 302 F.3d 1104, 1120 (10th Cir. 2002) (noting these provisions require an agency to study, develop and discuss appropriate alternatives and to briefly describe those alternatives). An agency's rejection of alternatives in an EA will be deemed illegal if the consideration is "so vague and unspecific as to be little more than platitudes." *Id.* at 1121. In a case where "[a]lternatives were dismissed in a conclusory and perfunctory manner that do not support a conclusion

that is was unreasonable to consider them as viable alternatives in the EA”, the agency’s action will be rejected. *Id.* at 1122. As here, *Davis* involved a situation where the agency only considered two alternatives in its EA, the not action and alternative and the preferred highway construction alternative, which the court deemed illegal.

Here, we have nothing more than platitudes being used to reject consideration of additional alternatives in the March EAs. *See, e.g.*, Butte Mar. 23, 2018 Oil and Gas Lease Sale EA App. A at 5. We have BLM’s bare assertion that it met its obligation to consider a range of alternatives, but nothing more. This does not meet the requirements of NEPA. *See, e.g. Colo. Env’tl. Coalition v. Salazar*, 875 F. Supp. 2d 1233, 1248-50 (D. Colo. 2012 (requiring consideration of alternatives that satisfy the project’s purpose and need and are neither “speculative” nor “infeasible”).

BLM acknowledges that there are potential impacts on the environment, even with the lease stipulations and other measures identified in the EAs. *See, e.g.*, Butte Mar. 23, 2018 Oil and Gas Lease Sale EA App. A at 5. Yet, BLM refused to consider any middle-ground alternatives suggested by the public that would further reduce these impacts. These alternatives, which include deferring specific parcels located in sensitive locations, such as along the Yellowstone River and directly across from the Town of Livingston, or deferring parcels in sage-grouse habitat, clearly satisfy the project’s purpose and need. “The purpose and need for this action is to respond to Expressions of Interest to lease parcels of land for oil and gas development as mandated by Federal laws, including the Mineral Leasing Act of 1920, Federal Land Policy and Management Act of 1976, and Federal Onshore Oil and Gas Leasing Reform Act of 1987.” *E.g., id.*, at 6. Further, these alternatives are neither “infeasible” nor “speculative,” given BLM’s broad discretion over leasing on public lands and duties to manage for other uses and activities, not just oil and gas development. Thus, BLM failed to evaluate a reasonable range of alternatives, as required by NEPA.

BLM Response:

The BLM analyzed all parcels in the EAs to determine what stipulations from the Resource Management Plans (RMPs) needed to be applied and if those stipulations are still adequate. The 2009 BFO RMP and 2015 BiFO and HiLine RMPs are recent RMPs and analyses were done on the stipulations and management actions for GRSG and all resources, using an up-to-date Reasonably Foreseeable Development Scenario. Since these parcels have stringent resource protections for all relevant resources (no-surface occupancy (NSO), controlled surface use (CSU)), there was no need to analyze an alternative excluding such parcels (i.e., no environmental impact issues remaining after the application of NSO and CSU stipulations that would indicate a need to look at an alternative with fewer parcels).

Priority Habitat Management Areas are a NSO stipulation for GRSG, and General Habitat Management Areas are a combination of NSO and CSU; therefore, providing high levels of

protection for the species. The BiFO and NCMD Field Offices followed the prioritization requirement of the RMP, deferring these parcels for several sales since the RMPs were signed while other parcels in the field office were leased instead). The BFO has no designated GRSG habitat. Since these parcels have stringent resource protections for all resources (NSO, CSU), and they followed the prioritization process, there was no need to analyze an alternative excluding such parcels (i.e., no environmental impact issues dictating a need to look at an alternative with fewer parcels).

2. The BLM has failed to take a hard look at the impacts of leasing.

BLM's failure to take a hard look at the environmental impacts of leasing- its refusal to consider impacts until there is an actual drilling proposal-violates NEPA because it does not acknowledge that oil and gas leasing represents an irreversible and irretrievable commitment of resources. As stated by the Tenth Circuit Court of Appeals,

...we first ask whether the lease constitutes an irretrievable commitment of resources. Just as we did in *Pennaco Energy*, 377 F.3d at 1160 and the D.C. Circuit did in *Peterson*, 717 F.2d at 1412, 1414, we concluded that issuing an oil and gas leases without an NSO [no surface occupancy] stipulation constitutes such a commitment.

New Mexico v. Bureau of Land Management, 565 F.3d 683, 718 (10th Cir. 2009).

The BLM discusses the likelihood of drilling in the three EAs (each of the EAs contains a "Reasonably Foreseeable Development Scenario" section), and there is at least some likelihood of wells be drilled on the Butte and Billings parcels, and on the North Central District parcels. It is anticipated 4 wells could be drilled on the lease parcels in the Butte Field Office (Butte EA at 12-13), 5.4 wells per year could be drilled on the Billings Field Office parcels (Billings EA at 17), and 11 wells could be drilled on the North Central District parcels (North Central Montana District EA at 16).

Thus, there are reasonably foreseeable impacts from the irreversible and irretrievable commitment represented by leasing, and these potential impacts cannot be ignored. If leases are issued now, it becomes difficult or impossible for the BLM to change course later. As identified in TWS's comments on the EAs, there are potential impacts on the town of Livingston, Yellowstone River, UMRBNM, and Greater Sage-grouse habitat that still have not been examined by the BLM. For instance, while the BLM included a reference to UMRBNM in the North Central Montana District's EA, it did not actually evaluate the potential impacts of leasing on the monument and whether additional measures were necessary to avoid or mitigate those impacts.

Additionally, relative to cumulative impacts to sage-grouse and sage-grouse habitat, the BLM continues to ignore, let alone analyze, the widespread leasing that is occurring in sage-grouse habitats outside the Billings and Butte Field Offices and the North Central

Montana District. We documented some, but not nearly all, of those lease sales in our October 30, 2017, comments, NEPA requires the BLM to evaluate the cumulative impacts of this lease sale “resulting from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.27(b)(7); *Kern v. Bureau of Land Management*, 282 F.3d 1062, 1075-77 (9th Cir. 2002).

BLM (in the Rocky Mountain Region Record of Decision and other sage-grouse plan amendments) and numerous authorities have recognized the importance of addressing sage-grouse conservation on a comprehensive range-wide basis, and accounting for connectivity between state and regional populations and habitats, habitat fragmentation, and other impacts. As stated in the Rocky Mountain Record of Decision (ROD): “The cumulative effect of these measures is to conserve, enhance, and restore GRSG habitat across the species’ remaining range in the Rocky Mountain Region and to provide greater certainty that BLM resource management plan decisions in GRSG habitat in the Rocky Mountain Region can lead to conservation of the GRSG and other sagebrush-steppe-associated species in the region.” Rocky Mountain ROD, p. S-2. The BLM must provide an analysis and make leasing decisions that advance this policy, but it has failed to do so.

Under NEPA, the BLM cannot lease hundreds of parcels covering many thousands of acres in Montana, Wyoming, and other states without considering the cumulative and trans-boundary impacts to the greater sage-grouse and other resources. It has failed to do so in the Montana March EAs, and thus we protest the proposed sale of the 109 parcels included in this lease sale.

In sum, the potential environmental impacts of leasing must be considered at the leasing stage to meet the requirements of NEPA.

BLM Response:

All three EAs tier to the appropriate respective RMPs (this is dependent on the geographic area in which the parcels are located), and these RMPs contain cumulative impacts at the appropriate scales for the full RFDs done in each FO (i.e., the RMPs address cumulative impacts resulting from the full development predicted within the RMP). The decisions on what areas to not lease, lease with standard, moderate, or major stipulations is done at the RMP level as well in order to look at the larger picture of impacts (including cumulative impacts). There are no surface-disturbing activities authorized at the leasing stage; any potential site-specific cumulative impacts not addressed in the RMPs would be completed at the application for permit to drill (APD) stage (when there is an actual proposal to drill). At the time of this review, it is unknown whether or not a particular parcel will be sold and a lease issued and what potential impacts to those resources may occur. The EAs use Reasonable Foreseeable Development Scenarios based on the RMPs to estimate potential effects.

A detailed site-specific analysis and mitigation of activities associated with any particular lease would occur when a lease holder submits an APD. This could include re-evaluating the area for protected species and habitat, additional conditions of approval (COAs) and involvement of external entities (e.g., USFWS), as necessary, based on the proposed action. The level of NEPA completed for future APDs (CX, DNA, EA, or EIS) would be based on site-specific considerations and the significance of effects.

At the leasing stage, site-specific drill locations are unknown. The BLM reviews proposed parcels and identifies stipulations based on what is known about the parcels such as presence of streams, wetlands, steep slopes, known nest sites, or designated habitat. These stipulations are essentially incorporated as design criteria in any future proposal. These stipulations were developed during the last RMP revisions. Site-specific NEPA analysis cannot occur until there is an APD.

Decisions to designate areas open or closed to oil and gas development are made at the RMP stage. The FEISs for Billings and HiLine both analyze the direct, indirect, and cumulative effects of leasing on GRSG habitat, and these EAs tier to that analysis. (Butte does not contain designated GRSG habitat.)

Both RMPs analyzed the leasing constraints (e.g., all PHMA habitat for MT/DKs BLM is covered by a NSO stipulation), the RFD for these actions, and the analysis of impacts. The RMPs were also coordinated to include consistent protective measures for greater sage-grouse (i.e., PHMAs being an exclusion areas for wind and solar development, etc.).

The RMP effects analysis satisfies the NEPA hard look requirement for analysis of direct, indirect, and cumulative effects of leasing, and the protesters have not provided any new citations that would require consideration in these EAs.

3. BLM has not complied with FLPMA's multiple use mandate.

As to the failure to meet FLPMA's multiple use mandate, BLM cannot meet this requirement under its "lease everything" approach where only two alternatives are considered. While leasing and oil and gas development are permissible uses on most BLM lands, it is only permissible when there is a careful balancing with other uses and values. Leasing all 109 parcels that have been nominated does not meet BLM's multiple use obligations. Even if the applicable RMPs permit leasing of these lands, leasing is not mandated.

"Under applicable laws and policies, there is no presumed preference for oil and gas development over other uses." BLM Instruction Memorandum (IM) 2010-117 at 2. BLM's NEPA handbook prohibits it from only considering alternative that an industry proponent of a project desires. BLM NEPA Handbook H-1790-1 at 49-50. As we have noted in comments on other BLM leasing EAs,

Federal courts have consistently rejected efforts to affirmatively elevate energy development over other uses of public lands. In the seminal case, *New Mexico ex rel. Richardson v. BLM*, the Tenth Circuit put to rest the notion that BLM can manage chiefly for energy development, declaring that “[i]t is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses.” 565 F.3d 683, 710 (10th Cir. 2009); see also *S. Utah Wilderness Alliance v. Norton*, 542 U.S. 52, 58 (2004) (defining “multiple use management” as “striking a balance among the many competing uses to which land can be put”). Other federal courts have agreed. See, e.g., *Colo. Envtl. Coalition v. Salazar*, 875 F. Supp. 2d 1233, 1249 (D. Colo. 2012) (rejecting oil and gas leasing plan that failed to adequately consider other uses of public lands).

At its root, BLMs’ “lease everything” approach seems to be rooted in the “energy dominance” policy of this Administration. BLM seems to be being driven by Executive Order No. 13783 (Promoting Energy Independence and Economic Growth) and Secretary of the Interior Order 3349 (American Energy Independence). But these administrative directives cannot override the statutory directives in FLPMA. It is the policy of the United States to protect natural resources on the public lands. 43 U.S.C. § 1701(a)(8). Multiple use means “the use of some of the land for less than all of the resources” as well as the “harmonious and coordinated management” of the resources “without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources...” Id. § 1702(c). Managing in compliance with the definition of multiple use is mandated, and this management must “prevent unnecessary or undue degradation of the lands.” Id. §§ 1732(a) and (b). BLM’s lease everything policy fails to meet these requirements, and thus fails to meet FLPMA’s multiple use mandate.

BLM Response:

The BFO, BiFO, and HiLine RMPs do incorporate the full multiple use policy of FLPMA. The RMPs have areas prioritized for ACEC management, management of visual resources and/or National Scenic and Historic Trails, areas prioritized for the management of recreation and various wildlife species, etc. The RMPs also allow development of oil and gas and coal resources and put the suitable constraints on these development activities. There are large portions of the RMP areas that have major constraints on activities (e.g., exclusion areas for wind or other rights-of-way, NSO for oil and gas, etc.). These RMPs were developed under the FLPMA and NEPA requirements and follow multiple use and sustained yield requirements. The lease sale EAs analyzed and attached all the appropriate stipulations to allow both development of minerals and protection of resources.

A decision to offer parcels for lease would not cause unnecessary or undue degradation and is consistent with existing laws, regulations, and policies, including the BFO, BiFO, and NCMD ARMPs, NEPA, MLA, and FLPMA. Upon receipt of an APD, the BLM would initiate a site-specific NEPA analysis with public review opportunities. Any COAs for permits to drill,

including measures necessary to prevent unnecessary and undue degradation, would be evaluated at the project level.

It is the policy of the BLM to make mineral resources available for use and to encourage development of mineral resources to meet national, regional, and local needs. This policy is based on various laws, including the Mineral Leasing Act of 1920 and the Federal Land Policy and Management Act of 1976 (FLPMA). The Federal Onshore Oil and Gas Leasing Reform Act of 1987 Sec. 5102(a)(b)(1)(A) directs the BLM to conduct quarterly oil and gas lease sales in each state whenever eligible lands are available for leasing.

- 43 C.F.R. § 3120.1-2
 - Each proper BLM State Office shall hold sales at least quarterly if lands are available for competitive leasing.
- Mineral Leasing Act of 1920 as amended- Subtitle B Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA)
 - Lease sales shall be held for each State where eligible lands are available at least quarterly....
- Washington Office Instruction Memorandum 2010-117 Oil and Gas Leasing Reform
 - State offices will continue to hold lease sales four times per year, as required by the Mineral Leasing Act, section 226(b)(1)(A) when eligible lands are determined by the state office to be available for leasing.
- Montana State Office Oil and Gas Leasing Reform Implementation Plan August 2010
 - All Montana Oil and Gas Competitive Lease Sales are subject to the following laws, regulations and policies: Required by law and regulation to hold lease sales at least quarterly if lands are available (Public Law 100-203, Sec. 5102, dated 12/22/87 (FOOGLRA)).

B. BLM has Failed to Prioritize Leasing Outside of Greater Sage-Grouse Habitats.

BLM has not prioritized leasing outside of sage-grouse habitat, as required by the ROD and ARMPA for the Rocky Mountain region, Billings/Pompeys Pillar National Monument ARMPA, and the HiLine ARMPA. Under the Rocky Mountain ARMPA ROD:

...the ARMPs and ARMPAs prioritize oil and gas leasing and development outside of identified PHMAs [priority habitat management areas] and GHMAs [general habitat management areas]. This is to further limit future surface disturbance and encourage new

development in areas that would not conflict with GRSG. This objective is intended to guide development to lower conflict areas and as such protect important habitat and reduce the time and cost associated with oil and gas leasing development by avoiding sensitive areas, reducing the complexity of environmental review and analysis of potential impacts on sensitive species, and decreasing the need for compensatory mitigation.

Rocky Mountain Region ARMPA ROD at 1-25.

The Billings/Pompeys Pillar National Monument ARMPA states that it will “[p]rioritize the leasing and development of fluid mineral resources outside GRSG habitat.”

Billings/Pompeys Pillar National Monument ARMPA at 2-6. And the HiLine ARMPA says the same thing: “[p]rioritize the leasing and development of fluid mineral resources outside GRSG habitat.” HiLine ARMPA ROD at 1-19.

Prior to its replacement in late December, BLM IM 2016-143 elaborated on the way agency staff are to comply with the requirement to prioritize leasing and development outside of sage-grouse habitat:

Lands within GHMAs: BLM State Offices will consider EOIs for lands within GHMAs, after considering lands outside of both GHMAs and PHMAs. When considering the GHMA lands for leasing, the BLM State Office will ensure that a decision to lease those lands would conform to the conservation objectives and provisions in the GRSG Plans (e.g., Stipulations).

Lands within PHMA: BLM state offices will consider EOIs for lands within PHMAs after lands outside of GHMAs and PHMAs have been considered, and EOIs for lands within GHMA have been considered. When considering the PHMA lands for leasing, the BLM State Offices will ensure that a decision to lease those lands would conform to the conservation objectives and provisions in the GRSG Plans (e.g., Stipulations) including special consideration of any identified [Sagebrush Focal Areas].

IM 2016-143 at 4.

IM 2016-143 also set out factors to consider (i.e., parcel-specific factors) after applying this prioritization sequence:

- Parcels immediately adjacent or proximate to existing oil and gas leases and development operations or other land use development should be more appropriate for consideration before parcels that are not near existing operations. This is the most import factor to consider, as the objective is to minimize disturbance footprints and preserve the integrity of habitat for conservations.
- Parcels that are within existing Federal oil and gas units should be more appropriate for consideration than parcels not within existing Federal oil and gas units.

- Parcels in areas with higher potential for development (for example, considering the oil and gas potential maps developed by the BLM for the GRSG Plans) are more appropriate for consideration than parcels with lower potential for development. The Authorized Officer may conclude that an area has “higher potential” based on all pertinent information, and is not limited to the Reasonable Foreseeable Development (RFD) potential maps from Plans analysis.
- Parcels in areas of lower-value sage-grouse habitat or further away from important life-history habitat features (for example, distance from any active sage-grouse leks) are more appropriate for consideration than parcels in higher-value habitat or closer to important life-history habitat features (i.e. lek, nesting, winter range areas). At the time the leasing priority is determined, when leasing within GHMA or PHMA is considered, BLM should consider, first, areas determined to be non-sage-grouse habitat and then consider areas of lower value habitat.
- Parcels within areas having completed field-development Environmental Impact Statements or Master Leasing Plans that allow for adequate site-specific mitigation and are in conformance with the objectives and provisions in the GRSG Plans may be more appropriate for consideration than parcels that have not been evaluated by the BLM in this manner.
- Parcels within areas where law or regulation indicates that offering the lands for leasing is in the government’s interest (such as in instances where there is drainage of Federal minerals, 43 CFR § 3162.2-2, or trespass drilling on unleased lands) will generally be considered more appropriate for leasing, but lease terms will include all appropriate conservation objectives and provisions from the GRSG Plans.
- As appropriate, use the BLM’s Surface Disturbance Analysis and Reclamation Tracking Tool (SDARTT) to check EOI parcels in PHMA, to ensure that existing surface disturbance does not exceed the disturbance and density caps and that development of valid existing rights (Solid Minerals, ROW) for approved-but-not-yet-constructed surface disturbing activities would not exceed the caps.

IM 2016-143 at 4-5.

These prioritization requirements continue to apply to this sale. The March EAs for the Billings Field Office and North Central District acknowledge that a combined total of 19 parcels overlap PHMA and another 39 parcels overlap GHMA. Billings EA at 64; North Central Montana District EA at 45-46. FLPMA requires that lease sale decisions comply with governing use plans. *See* FLPMA § 302(a), 43 U.S.C. § 1732(a) (“The Secretary shall manage public lands...in accordance with land use plans developed by him under section 1712 of this title...”); see also 43 C.F.R. § 1610.5-3(a) (48 Fed. Reg. 20,368 (May 5, 1983)) (“All future resource management authorizations and actions...shall conform to the approved plan.”).

In its final EAs, BLM added a brief analysis of some (but not all) of the IM 2016-143 factors for the Billings and North Central offices. See Billings EA, Appendix F. Appendix F provides tables listing the number of parcels in several categories, including:

- a) Whether the parcel is in grouse habitat (GHMA, RHMA or PHMA);
- b) A “legal obligation” to lease;
- c) Whether a parcel is “within existing disturbance” or “no existing disturbance”; and
- d) Inside or outside a 3.1 miles distance from a lek.

Id. These tables show that many parcels cover grouse habitat and are outside of areas of existing disturbance, indicating they should be a low priority for leasing. Some of the parcels also lie within 3.1 miles of a lek. *Id.*

The low likelihood of drilling occurring on these parcels also emphasizes the need to prioritize leasing outside of these 19 PHMA and 39 GHMA parcels. In the Billings Field office only 20 of the 76 parcels are in areas with a moderate development potential and 56 are in areas with low development potential. None have high development potential. Billings EA at 17. In the North Central Montana District, 11 of the 24 parcels have a low development potential and 2 have very low potential with only 9 parcels having a moderate development potential and 2 having a high development potential. North central Montana District EA at 16. At a minimum, the BLM should have not have proposed to lease parcels in PHMA that are in areas with a low development potential.

After providing that information, however, BLM still plans to offer *all* of the leases in *all* of the prioritization categories. Appendix F fails to explain how a decision not to defer any parcels actually applies the prioritization requirement of the RMPs. Acknowledging the prioritization factors and RMP requirement is not the same as applying them.

Nor has BLM explained how a decision to offer all of the leases in GHMA, PHMA, and RHMA applies terms of the new Instruction Memorandum 2018-026, issued December 27, 2017. To the extent IM 2018-026 can be read as purporting to remove any requirement to limit leasing in sage-grouse habitat management areas, and the requirement to direct leasing outside those areas, it is inconsistent with the RMPs. The entire point of the RMPs' prioritization objective is to limit development and surface disturbance in important sage-grouse habitat-not simply to order BLM's administrative paperwork. Nor is the RMP prioritization requirement satisfied by "encourag[ing] lessees to voluntarily prioritize leasing" outside habitat management areas. IM 2016-026. The prioritization objective applies to *BLM's* decisions about where to offer leases-not the business choices of companies with no stewardship obligations-and it is binding on the agency.

With these comments, we are submitting and incorporating by reference a letter from leading sage-grouse scientist Dr. Matt Holloran addressing the importance of prioritization of leasing and development outside sage-grouse habitat, as well as the need to address the reasonably foreseeable cumulative impacts of leasing on the grouse. Attached as Exhibit 1 to these comments. This letter specifically cautions BLM against disregarding or abandoning the prioritization requirement. The letter further concludes

that by disregarding the prioritization requirement; BLM is failing to protect sage grouse habitat at the landscape level as required by the ARMPAs.

BLM clearly must apply the prioritization objective from the RMPs to this lease sale when parcels are proposed in or near PHMA and GHMA, and explain how its leasing decision complies with that mandate. BLM has failed to do so. Even if the BLM is not required to defer the sale of all parcels in PHMA and GHMA, it is impossible to see how some of these parcels would not be deferred, if the RMPs were faithfully applied. "Priority" for leasing of fluid minerals outside of PHMA and GHMA would be demonstrated by deferring the sale of at least some lease parcels in these areas.

Leasing constitutes an irreversible and irretrievable commitment of resources, and in addition a lease gives a lessee the right to develop oil and gas. Form 3100-11 and 43 C.F.R. § 3101.1-2. Thus, it is clear that leasing has tangible aspects that cannot be ignored if BLM is to meet the commitment to prioritize leasing outside of sage-grouse habitats.

Under FLPMA, when an RMP is developed, the Secretary of the Interior must manage the public lands "in accordance" with the RMP. 43 U.S.C. § 1732(a). And under BLM's land use planning regulations, BLM must make resource management authorizations and take management actions in a way that "shall conform to the approved plan." 43 C.F.R. § 1610.5- 2033 (48 Fed. Reg. 20368 (May 5, 1983)). Commenting on these provisions, the Supreme Court said:

The statutory directive that BLM manage "in accordance with" land use plans, and the regulatory requirement that authorizations and actions "conform to" those plans, prevent BLM from taking actions inconsistent with the provisions of a land use plan.

Norton v Southern Utah Wilderness Alliance, 542 U.S. 55, 68 (2004).

Thus, it is clear that that the BLM must abide by the sage-grouse RMPs in this lease sale. BLM's leasing decisions, not just its development decisions, must comply with the ARMPAs. BLM is to "prioritize oil and gas leasing ... outside of identified PHMAs and GHMAs." Rocky Mountain ARMPA ROD at 1-25. See also Billings/Pompeys Pillar National Monument ARMPA at 2-6 and HiLine ARMPA ROD at 1-19 (same).

BLM Response:

Washington Office (WO) Instruction Memorandum (IM) 2018-026 was not issued until December 27, 2017, and was not in effect during parcel prioritization for this sale.

The 2015 Rocky Mountain Record of Decision (ROD) Table 1-4 summarizes the major components of the ARMPs and ARMPAs that address specific threats to GRSG and its habitat.

Key Management Responses include “Prioritize the leasing and development of fluid mineral resources outside GRS habitat.” ROD at 1-19.

The Rocky Mountain ROD describes prioritization as an "objective" in the plans.

Prioritization Objective-In addition to allocations that limit disturbance in PHMAs and GHMAs, the ARMPs and ARMPAs prioritize oil and gas leasing and development outside of identified PHMAs and GHMAs. This is to further limit future surface disturbance and encourage new development in areas that would not conflict with GRS. This objective is intended to guide development to lower conflict areas and as such protect important habitat and reduce the time and cost associated with oil and gas leasing development by avoiding sensitive areas, reducing the complexity of environmental review and analysis of potential impacts on sensitive species, and decreasing the need for compensatory mitigation. ROD at 1-25.

This priority was not included as an allocation decision or management decision in the BLM's RMP revisions and amendments. To clarify how this objective would be implemented by the BLM, on September 1, 2016, the WO issued IM 2016-143. This IM only provides guidance on implementation of the land use plans, was not issued for public notice and comment and, therefore, does not constitute rulemaking for the BLM.

The BiFO and NCMD followed the prioritization guidance described in IM 2016-143-Implementation of Greater Sage-Grouse RMP Revisions or Amendments-Oil & Gas Leasing and Development Sequential Prioritization. The BFO was not included in the 2015 ROD because it does not have any BLM-designated GRS habitat.

IM 2016-143 acknowledges the allowance of leasing in GHMA or PHMA, and the consideration of other factors.

This IM does not prohibit leasing or development in GHMA or PHMA as the GRS plans will allow for leasing and development by applying prioritization sequencing, stipulations, required design features, and other management measures to achieve the conservation objectives and provisions in the GRS plans. IM at 2.

BLM field offices should integrate the above prioritization sequence in their processing of pending permits as they consider the overall workload to fairly and objectively address their permitting prioritization. Only insofar as they are consistent with the prioritization approach described in this IM, BLM field offices may also take into consideration other prioritization considerations, such as considering permitting on a first-in/first-out basis to the extent possible, unit obligation wells, the efficiency to be gained in processing the easiest to complete first, the operator's drilling Plans, workload capacities, and other resource values. IM at 10.

IM 2016-143 also concedes that the BLM's implementation of its prioritization must be "subject to valid existing rights and any applicable law or regulation, including but not limited to, 30 U.S.C. 226(p) and 43 C.F.R. 3162.3-l(h)." IM at 12. The BLM must follow several statutory and regulatory timeframes for processing of oil and gas leases, including those described in the IM. The BLM will continue to comply with these requirements when apportioning agency resources and prioritizing individual permit applications that propose Federal oil and gas lease operations, as the IM recognizes.

The BLM evaluated the parcels according to IM 2016-143 and determined that all parcels could be carried forward for analysis in the BiFO and NCMD Leasing EAs because the 2015 ARMPs include standards that conserve GRSG habitat, and the BiFO and NCMD staff had sufficient resources to process and analyze all nine (9) and 24 parcels, respectively. All parcels in PHMA are No Surface Occupancy (NSO 11-127 and NSO 11-152). Within GHMA, surface occupancy and use is prohibited for oil and gas exploration and development within 0.6 mile of the perimeter of Greater Sage-grouse leks (NSO 11-128 and NSO 11-151), and surface-disturbing or disruptive activities may be restricted or prohibited within 2 miles of GRSG leks (CSU 12-67). In addition, surface use is prohibited from December 1 through March 31 in GRSG winter range (TL 13-43). Had the BiFO and NCMD parcel lists been larger or if there were inadequate staff resources, the MSO, in coordination with the BiFO and NCMD, could have trimmed the parcel list to a manageable size by excluding parcels in GRSG habitat in accordance with the prioritization sequence criteria and evaluation factors. However, for the March 13, 2018, lease sale, there was no need to apply the prioritization sequence criteria because BiFO and NCMD staff were able to conduct the necessary analyses of all parcels.

The BiFO and NCMD leasing EAs are tiered to the information and analysis and conform to the decisions contained in the 2015 Rocky Mountain ROD. The BFO was not part of that ROD. The three leasing EAs also tier to the BFO, BiFO, and HiLine Approved Resource Management Plans (ARMPs). The ROD and ARMPs are in compliance with all Federal laws, regulations, and policy. The direct, indirect, and cumulative effects of oil and gas leasing across the field offices were evaluated in the Final Environmental Impact Statements (FEIS) for the ARMPs.

A lease parcel prioritization review was completed for the March 13, 2018, lease sale. Appendix E of the NCMD EA and Appendix F of the BiFO EA, Lease Sale Prioritization Sequence Consideration Factors, describe the results of that analysis, and the field office rationale and methodology for complying with the GRSG plans and IM 2016-143.

The BLM's Authorized Officer, acting under the delegated authority of the Secretary of the Interior, has discretion to determine which public lands will be offered at a lease sale. The Mineral Leasing Act of 1920 (MLA), as amended, provides that lands subject to disposition under the Act "which are known or believed to contain oil or gas deposits may be leased by the Secretary." (30 U.S.C. § 226(a) (emphasis added)). When evaluating Expressions of Interest (EOIs) to lease particular parcels, pursuant to the Competitive Leases Handbook (H-3120-1), the BLM will plan for leasing and

development in accordance with the objectives and provisions in the GRSG Plans. NCMD EA Appendix E.

The WO IM No. 2016-143 does not prohibit leasing or development in GHMA or PHMA as the GRSG Plans allow for leasing and development by applying prioritizing sequencing, stipulations, required design features, and other management measures to achieve the conservation objectives and provisions in the GRSG Plans. This guidance was not intended to direct the Authorized Officer to wait for all lands outside GRSG habitat areas to be leased or developed before allowing leasing within GHMAs, and then to wait for all lands within GHMAs to be leased before allowing leasing or development within the next habitat area (PHMA, for example). *Id.*

In the case of the nominated parcels sent to the NCMD for the March 13, 2018, lease sale, there were 24 parcels within public or split estate lands managed by the NCMD (Glasgow, Malta, and Havre Field Offices). Of the 24 parcels nominated for the March 18, 2018, Oil/Gas Lease Sale, ten (3,213.7 acres) are within GHMA and two (760.0 acres) are within PHMA of the HiLine Sub-region of the Rocky Mountain Region Planning Area for GRSG. Two of the parcels (MTM 19010-B9 and 79010-C1) were deferred from previous lease sales prior to the BLM's approval of the 2015 GRSG amendments in the ARMP. Now that RMP level standards are in place to conserve GRSG habitat, these parcels were included in the March 13, 2018, lease sale.

As disclosed in Chapter 3 of the leasing EAs, offering the parcels for lease would have no direct effects on special status wildlife species and habitat. Any potential effects on wildlife resources from the sale of lease parcels would occur at the time the leases are developed at the APD stage. For development to occur on a lease parcel, an APD must be submitted, at which time the field office completes NEPA analysis to disclose the impacts from development. A site-specific analysis to further avoid and minimize impacts to GRSG and GRSG habitat would occur at the APD stage when a specific proposal is identified. The analysis would include disturbance and density analysis to determine if the proposed actions is within limits established in the approved RMPs. The analysis would also identify additional site-specific impacts that cannot be discerned or quantified at this time, and would identify the appropriate mitigation measures to be applied as conditions of approval, required design features, and best management practices to ensure the conservation and protection of all natural resources, including GRSG.

The following stipulations and lease notice were applied to mitigate any potential adverse impacts to GRSG and GRSG habitats.

NSO 11-128 GREATER SAGE-GROUSE GENERAL HABITAT MANAGEMENT AREAS (BiFO)

To protect general habitat areas for Greater Sage-grouse breeding activities, surface occupancy and use is prohibited for oil and gas exploration and development with 0.6 mile of the perimeter of Greater Sage-grouse leks.

NSO 11-127 GREATER SAGE-GROUSE PRIORITY HABITAT MANAGEMENT AREAS (BiFO)

To protect Greater Sage-grouse, a priority species for management, surface occupancy and use is prohibited for oil and gas exploration and development within Greater Sage-grouse Priority Habitat Management Areas (PHMAs).

NSO 11-152 GREATER SAGE-GROUSE PRIORITY HABITAT MANAGEMENT AREAS (NCMD)

Surface occupancy and use is prohibited within Greater Sage-Grouse Priority Habitat Management Areas and the Grassland Bird/Greater Sage-Grouse Priority Habitat Management Area.

NSO 11-151 GREATER SAGE-GROUSE LEKS GENERAL HABITAT MANAGEMENT AREAS (NCMD)

Surface occupancy and use is prohibited within 0.6 miles of Greater Sage-Grouse leks. This stipulation does not apply within the boundaries of the Greater Sage-Grouse PHMA.

NSO 11-136 CRUCIAL WINTER RANGE (BiFO)

Surface occupancy and use is prohibited for oil and gas exploration and development in crucial winter range for antelope, elk, moose, bighorn sheep, mule deer, white-tailed deer, and Greater Sage-grouse.

CSU 12-67 GREATER SAGE-GROUSE NESTING HABITAT (GHMA) (NCMD)

Within Greater Sage-Grouse general habitat, surface-disturbing or disruptive activities may be restricted or prohibited within 2 miles of Greater Sage-Grouse leks. Prior to surface-disturbing or disruptive activities, a plan to maintain functionality of Greater Sage-Grouse habitat will be prepared by the proponent and implemented upon approval by the AO. This plan shall address how short-term and long-term direct and indirect effects to nesting and brood-rearing areas will be mitigated based on current science and research.

TL 13-43 GREATER SAGE-GROUSE WINTER RANGE (NCMD)

Surface occupancy and use is prohibited from December 1 through March 31 in Greater Sage-Grouse winter range.

TL 13-40 SAGE-GROUSE NEST AREAS (RHMA AND GHMA) (BiFO)

Surface use is prohibited from March 1 through June 30 within 3 miles of sage grouse leks.

LN 14-11 GREATER SAGE-GROUSE HABITAT (BFO)

The lease may, in part or in total, contain important greater sage grouse habitats as identified by the BLM, either currently or prospectively. The operator may be required to implement specific measures to reduce impacts of oil and gas operations on the greater sage grouse populations and habitat quality. Such measures shall be developed during the APD on-site and environmental review process and will be consistent with the lease rights granted.

IV. CONCLUSION

The Protesters requested that the BLM withdraw 109 parcels from the MSO, March 13, 2018, Competitive Oil and Gas Lease Sale. The Protesters contend that the BLM 1) failed to consider a reasonable range of alternatives in the EA, 2) failed to take a hard look at the impacts of leasing, 3) is not meeting the multiple use requirements of FLPMA, and 4) has not met its obligation to prioritize leasing outside of greater sage-grouse habitat.

The BLM Montana State Director has decided to defer three (3) BFO parcels and 23 BiFO parcels from the MSO, March 13, 2018, Competitive Oil and Gas Lease Sale. The protest of these 26 parcels is dismissed as moot. The protest of the other 83 parcels is dismissed for the reasons stated above.

The BLM dismisses this protest for the reasons stated above.

The BLM, in accordance with existing regulations and policies, will defer leasing actions on 26 lease parcels in the BFO and BiFO planning areas. See Enclosure 3 for a description of the deferred parcels. The BLM will offer for lease the other 83 protested parcels as described in the MSO, March 13, 2018, Notice of Competitive Oil and Gas Lease Sale.

Administrative Review and Appeal

This Decision may be appealed to the Interior Board of Land Appeals (IBLA), Office of the Secretary, in accordance with the regulations contained in 43 C.F.R. § 4 and Form 1842-1 (Enclosure 2). If an appeal is taken, the Notice of Appeal must be filed in the Montana State Office at the above address within 30 days from receipt of this Decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition for a stay of the effectiveness of this Decision during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay must show sufficient justification based on the standards listed below

Copies of the notice of appeal and petition for stay **must** be submitted to the IBLA and the appropriate Office of the Solicitor (see 43 C.F.R. § 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulations, a petition for a stay of a decision pending appeal shall be evaluated based on the following standards:

1. The relative harm to the parties if the stay is granted or denied;
2. The likelihood of the appellant's success on the merits;
3. The likelihood of immediate and irreparable harm if the stay is not granted; and
4. Whether the public interest favors granting the stay.

/s/ Donato J. Judice

Donato J. Judice
Deputy State Director
Division of Energy, Minerals, and Realty

3 Enclosures

- 1-WS, PCEC, and MWA Protest Letter Dated January 11, 2018 (25 pp)
- 2-Form 1842-1 (2 pp)
- 3-Description of 26 Deferred Parcels (5 pp)